

September 28, 2001

Mr. David A. Lochbaum
Union of Concerned Scientists
1707 H Street NW, Suite 600
Washington, DC 20006-3919

Dear Mr. Lochbaum:

Your petition dated April 24, 2001, submitted on behalf of the Union of Concerned Scientists, addressed to Mr. William Travers, Executive Director of Operations, has been reviewed by the Nuclear Regulatory Commission staff pursuant to Section 2.206 of Title 10 of the *Code of Federal Regulations*. The staff's proposed Director's Decision on the petition is enclosed. I request that you provide comments to me on any portions of the proposed Decision that you believe to be erroneous or any issues in the petition that you believe have not been fully addressed. The staff will then review your comments and consider them in the final version of the Director's Decision. You will have no further opportunity to comment.

Please provide your comments within 14 days of the date of this letter.

Sincerely,

/RA/

John A. Zwolinski, Director
Division of Licensing Project Management
Office of Nuclear Reactor Regulation

Docket No. 50-247

Enclosure: Proposed Director's Decision

cc: See next page

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
OFFICE OF NUCLEAR REACTOR REGULATION

Samuel J. Collins, Director

In the Matter of)	Docket No. 50-247
)	
CONSOLIDATED EDISON COMPANY OF)	License No. DPR-26
NEW YORK, INC.)	
)	
(Indian Point Nuclear Generating Station)	
Unit No. 2))	

DRAFT

PROPOSED DIRECTOR'S DECISION UNDER 10 CFR 2.206

I. Introduction

By letter dated April 24, 2001, as supplemented by letter dated May 3, 2001, Mr. David A. Lochbaum, on behalf of the Union of Concerned Scientists (Petitioner), pursuant to Section 2.206 of Title 10 of the *Code of Federal Regulations* (10 CFR 2.206), requested that the U.S. Nuclear Regulatory Commission (Commission or NRC) issue a Demand for Information (DFI) to licensees that use security personnel supplied by Wackenhut Corporation (Wackenhut), requiring them to provide a docketed response explaining how they comply with the requirement of 10 CFR 26.10 that licensees "provide reasonable measures for the early detection of persons who are not fit to perform activities within the scope of this part" and the requirement of 10 CFR 26.20 that "licensee policy should also address other factors that could affect fitness for duty such as mental stress, fatigue and illness."

The petitioner also requested that the DFI require each licensee to generally describe its policy for the aforementioned factors and to explicitly describe its policy for these factors as applied to the security personnel supplied by the Wackenhut Corporation.

II. Background

As a basis for the request described above, the Petitioner stated that:

An individual employed by Wackenhut Corporation and assigned duties as a security officer at Indian Point 2 was fired on June 26, 2000 The individual had worked five straight 12-hour shifts [12 hours on shift followed by 12 hours off for 5 straight days] and declined to report for a sixth straight 12-hour shift because he reported to his management—in writing—that it would be “physically and mentally exhausting.” The individual reported to his management—in writing—that he was fully aware of his condition and “would not want to be negligent in performing [his] duties as a security officer.”

The security officer had unescorted access to Indian Point 2 and thus was covered by 10 CFR Part 26 as specified in Section 26.2

The petitioner also indicated that Wackenhut employees are required by terms of their employment application, their Collective Bargaining Agreement, and the Security Officer Handbook to report to work when required.

The petitioner stated that the subject security officer reported to his management that he felt unfit for duty, declined to report for mandated overtime, and was terminated.

The petitioner also stated that “10 CFR 26.20 requires all licensees to have [a] formal policy and written procedures for factors that could render plant workers unfit for duty. Fatigue is specifically mentioned in 10 CFR 26.20.”¹ The petitioner contended that Wackenhut’s contractual right conflicts with the Federal regulations in 10 CFR 26.10(a) and (b) and that in the subject case, the individual essentially provided “reasonable measures for early detection”

¹ The staff acknowledges that 10 CFR 26.20 specifically mentions fatigue. However, the language is nonmandatory. Paragraph 26.20(a) states that “licensee policy *should* [emphasis added] also address other factors that could affect fitness for duty such as mental stress, fatigue, and illness.”

of a condition rendering him unfit to perform activities within the scope of Part 26. The petitioner further stated that, rather than respecting the individual's judgment or seeking another opinion by a Medical Review Officer or other health care professional, Wackenhut fired that individual.

Subsequently, the petitioner provided additional information by letter dated May 3, 2001, and addressed the Petition Review Board (PRB) in a transcribed telephone conference on May 7, 2001. The transcript of this telephone conference is available in the Agencywide Documents Access and Management System (ADAMS) for inspection at the Commission's Public Document Room (ADAMS accession number ML012150128), located at One White Flint North, 11555 Rockville Pike (first floor), Rockville Maryland, and from the ADAMS Public Library component on the NRC's Web site at <http://www.nrc.gov/NRC/ADAMS/index.html> (the Public Electronic Reading Room). The Petition, transcript, and other related correspondence are also available for public viewing on the NRC Web site at <http://www.nrc.gov/NRC/REACTOR/IP/index.html>. If you do not have access to ADAMS, or if you have problems in accessing the documents in ADAMS, contact the NRC Public Document Room (PDR) reference staff at 1-800-397-4209 or 301-415-4737 or by e-mail to pdr@nrc.gov. Based on the information provided by the petitioner, the PRB determined that his request met the criteria for review under 10 CFR 2.206. In addition, by letter dated June 13, 2001, the NRC responded to the petitioner's letter dated April 23, 2001, in which he requested clarification of NRC policy concerning fatigue of security personnel.

III. Discussion

In response to the petition, the staff reviewed (1) the Wackenhut Security Officer Handbook and (2) the Agreement between Wackenhut Corporation and International Union, United Plant Guard Workers of America (UGPWA) and its Amalgamated Local 515 for Security Employees at ConEd Nuclear Power Station, Indian Point, NY, for the period of March 8, 1999,

to March 3, 2002 (Agreement). The purpose of the review was to determine whether the terms or conditions of these documents, as they pertain to a worker's declaration of fitness for duty (FFD), are contrary to requirements applicable to NRC licensees, their contractors or subcontractors, or their employees. The staff also reviewed concerns received by the NRC in the last 2 years that licensee procedures, policies, or practices discouraged individuals from reporting that they were not fit for duty because of excessive fatigue. Through these reviews, the staff sought to determine whether a DFI, as requested through the petition, was warranted. The NRC is independently addressing the adverse employment action taken against the subject security guard consistent with agency procedures. Further, the staff has reviewed the relationship between ConEd and Wackenhut. The staff determined that Wackenhut is required to implement the licensee's procedures regarding fitness for duty. Thus, the licensee maintains an awareness of Wackenhut personnel procedures and practices. Also, the NRC issued a "chilling effect letter" to ConEd on February 27, 2001. The NRC issued this letter following a February 8, 2001, letter from the Area Director of the Occupational Safety and Health Administration (OSHA). The letter stated that OSHA's investigation indicated that a contract security employee was engaged in a protected activity within the scope of the Energy Reorganization Act and that discrimination, as defined and prohibited by the statute, was a factor in the termination of the individual's employment. Although there was a settlement in the OSHA case, the NRC is continuing to review this matter.

Staff's Findings

The preface to the Wackenhut Security Officer Handbook states: "The company retains the absolute right to terminate any employee, at any time, with or without good cause." In addition, Section 2.15, Discipline, of the Wackenhut Security Officer Handbook, itemizes "refusal to work" as grounds for immediate dismissal. The staff identified these statements as terms of employment which may be applicable to instances of workers who refuse to work

because of FFD concerns. However, the staff finds no *necessary* inconsistency between these statements and Part 26. Although individuals may declare to their employer that they are not fit for duty because of excessive fatigue, and the NRC encourages individuals to inform their employer if they believe their FFD is suspect, Part 26 does not require the individual to refuse to work and thereby risk disciplinary action. Rather, Part 26.27(b)(1) states that “impaired workers, or those whose fitness may be questionable, shall be removed from activities within the scope of this part, and may be returned only after determined to be fit to safely and competently perform activities within the scope of this part.” As a consequence, when presented with information that a worker’s fitness for duty is questionable, it is the licensee’s responsibility to make a determination that the individual is fit for duty, prior to returning the individual to his or her duties.

In reviewing the Agreement between Wackenhut and UGPWA, the staff noted that Article 18 of the Agreement, Separability, states:

Should any provisions of this Agreement at any time during its life be found in conflict with the federal or state law, or as such laws may be amended, then such provisions shall continue in effect only to the fullest extent permissible under the applicable law . . .

Thus, the document makes it clear that compliance with NRC requirements is required, regardless of any terms or conditions in the Agreement that may be in conflict with Federal law.

Part 26 does not constitute the only regulatory constraint upon licensees and their contractors in matters concerning worker declarations of FFD. Part 50.7 prohibits discrimination by a licensee, or a licensee contractor or subcontractor, against an employee for engaging in protected activities.² As a consequence, it is a violation of Part 50.7 for a licensee,

² Discrimination includes discharge and other actions that relate to compensation, terms, conditions, or privileges of employment.

or its contractor or subcontractor, to take adverse personnel action against an individual when the basis of the action is, either in whole or in part, the individual's assertion that he or she is unfit for duty or the individual's refusal to work based upon reasonable belief that returning to work would be a violation of Part 26. However, pursuant to Part 50.7(d), an employee's engagement in protected activities does not automatically render him or her immune from discharge or discipline for legitimate reasons or from adverse action dictated by nonprohibited considerations.

In the event that an individual asserts that a licensee, or its contractor or subcontractor, took adverse employment action against an individual following a self-declaration that he or she is not fit for duty, the NRC reviews the circumstances of, and the bases for, the action in order to make a determination concerning the potential violation of any NRC requirements. In reviewing the licensee's basis for any employee sanction, with respect to the requirements of 10 CFR 50.7, the NRC would consider whether the licensee had a legitimate, non-discriminatory basis for the sanction.

Separate from its inquiry into potential violations of 10 CFR 50.7, the NRC may, under certain circumstances, also consider whether a licensee's FFD program meets the general performance objective of Part 26 that licensee FFD programs provide reasonable assurance that nuclear power plant personnel are not "mentally or physically impaired from any cause, which in any way affects their ability to safely and competently perform their duties". Specifically, the NRC may assess whether a licensee's work schedule and practices for assessing fitness for duty are resulting in personnel performance consistent with reasonable assurance that personnel are fit for duty.

Although employees who report FFD concerns may be subject to employer sanctions for other, nonprohibited, considerations (e.g. personal negligence with respect to maintaining one's FFD), the staff notes that such sanctions, depending upon how they are implemented and or

communicated, can potentially discourage future self-declarations. Pursuant to 10 CFR 26.10(b), FFD programs must provide reasonable measures for the early detection of persons who are not fit to perform their activities. The NRC considers self-declaration to be an important adjunct to behavioral observation in providing early detection of persons who are not fit for duty because of fatigue. As a result, the NRC may, under certain circumstances, find it appropriate to assess whether a licensee's actions, in conjunction with the prescribed work schedules, has created an environment that is not conducive to the reporting of FFD concerns. The NRC may also find it appropriate to assess such circumstances relative to the NRC's policy statement, "Freedom of Employees in the Nuclear Industry to Raise Safety Concerns Without Fear of Retaliation."

IV. Conclusion

The staff's review indicates that the written conditions and agreements between Wackenhut, its employees, and UGPWA are not, by themselves, violations of NRC requirements. However, the petitioner has raised a generic policy matter which may warrant clarification of how NRC requirements apply to circumstances involving individuals who declare themselves not fit for duty because of fatigue and to the actions taken by licensees in response to such declarations. Specifically, the petitioner has pointed out that the manner in which a licensee or its contractor implements certain conditions of employment or policies for preventing the abuse of leave can potentially discourage employees from reporting that they are not fit for duty because of fatigue, thereby undermining the effectiveness of a licensee's FFD program. These concerns may not be limited to licensees that use Wackenhut security personnel. As a result, the staff does not believe that a regulatory action limited to licensees that use Wackenhut security personnel is an appropriate means to address this concern. In addition, the staff believes that in matters concerning self-declaration of FFD, the potential for conflicts with NRC requirements is largely in the implementation of licensee policies, procedures, and

conditions of employment, rather than the written terms of these documents. Accordingly, a DFI requesting such documents is not expected to provide significant new information to the staff and therefore does not appear warranted. However, the staff has decided to grant the petitioner's request to the extent that the NRC will address the petitioner's concerns through the generic communication process. Specifically, the staff will develop a communication to all nuclear power plant licensees subject to the requirements of Part 26. The communication will highlight the concerns identified through the petition and articulate the NRC's requirements as they apply to matters involving a worker's self-declaration of FFD. The staff anticipates issuance of such communication within six months of the date of this Director's Decision. In addition, should the Commission direct the staff to proceed with its proposals to revise Part 26 and address worker fatigue through rulemaking, the staff will consider the need to clarify the NRC's expectations concerning worker declarations of FFD and work scheduling.

A copy of this Decision will be filed with the Secretary of the Commission for the Commission's review in accordance with 10 CFR 2.206(c). As provided for by that regulation, the Decision will constitute the action of the Commission 25 days after the date of issuance of the Decision unless the Commission, on its own motion, institutes a review of the Decision within that time.

FOR THE NUCLEAR REGULATORY COMMISSION

Samuel J. Collins, Director
Office of Nuclear Reactor Regulation

Dated at Rockville, Maryland,
this day of 2001.